No. 241

In the

Supreme Court of the United States

OCTOBER TERM, 1942

KANSAS CITY LIFE INSURANCE COMPANY, a Corporation,
PETITIONER,

v.

CARRIE J. PARFET, Administratrix of the Estate of George W. Parfet, Deceased.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

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PEERLESS PRINTING COMPANY, DENVER

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I.

STATEMENT OF CASE.

This is an action begun in the United States District Court for the District of Colorado under the accidental death (double indemnity) clause of a life insurance policy. The respondent, plaintiff in the District Court, is a resident and citizen of the State of Colorado. The petitioner, the defendant in the District Court, is a citizen of the State of Missouri and a corporation incorporated under the laws of the State of Missouri. The matter in controversy exceeds Three Thousand Dollars ($3,000.00) (R. p. 7).

The jurisdiction of the District Court is dependent upon diversity of citizenship and the requisite amount.

After the trial, lasting two days, the jury returned a verdict in favor of the defendant and judgment of dismissal was entered thereon (R. p. 13). A motion to set aside the verdict and judgment and for a new trial was filed by the respondent (R. pp. 14-18). The District Court entered its memorandum opinion denying respondent's motion and entered its order denying said motion (R. pp. 18-20).

An appeal was duly perfected to the United States Circluit Court of Appeals for the Tenth Circuit. On May 19th, 1942, the Circuit Court of Appeals rendered its decision (R. pp. 153-156) and, on the same day, the Circuit Court of Appeals entered its order reversing and remanding the cause to the District Court for further proceedings in conformity with the views expressed in said opinion (R. p. 156).

The petitioner now seeks to have this Court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, under the provisions of Section 347 of Title 28, U. S. C. A. (Sec. 240(a), of the Judicial Code as amended by the Act of February 13, 1925).

II.

PLEADINGS.

In her complaint (R. pp. 7-11), the plaintiff alleged that she was the duly appointed, qualified and acting administratrix of the Estate of George W. Parfet, Deceased, and was authorized and empowered by the County Court of the County of Jefferson, Colorado, to bring and prosecute this action.

Respondent further alleged that on May 19, 1938, the defendant issued its policy of insurance upon the life of George William Parfet in the sum of Six Thousand Dollars ($6,000.00) and that in consideration of the payment of an extra premium the petitioner attached to said policy a certain agreement commonly referred to as "double in-

demnity benefit". Said double indemnity agreement is set out in full in the record (R. pp. 8-9).

In paragraph 6 of her complaint, the respondent further alleged that on March 21, 1940, the said George W. Parfet was fatally injured by an explosion of dynamite near Golden, Colorado, and that the death of said George W. Parfet resulted independently and exclusively of all other causes, solely from bodily injury effected directly by external, violent and accidental means within a few hours from the happening of said injury, of which there were visible contusions and wounds on the exterior part of the body of said George W. Parfet.

In said Complaint, the respondent prayed judgment against the petitioner for Six Thousand Dollars ($6,000.00) together with interest and costs.

The petitioner filed its answer to said Complaint wherein it admitted the death was caused by explosion but denied the allegations of Paragraph 6. It admitted all other parts of the complaint excepting the right to judgment. In addition, the defendant alleged that the death of said George W. Parfet resulted from self-destruction.

III.

FACTS.

On the morning of March 21, 1940, George Parfet superintendent of the Parfet and the Ruby Clay Companies, Golden, Colorado, both companies using dynamite daily in their clay operations, was mangled and crippled by an explosion of dynamite from which injuries he died approximately two hours later. About eight sticks of dynamite exploded at his feet in close proximity to him, just after he had taken the dynamite from a new box of powder. He was then about fifteen or twenty feet away from the powder magazine and on his way (R. 44) to deliver the powder and caps and fuse to Ray Rutledge (R. 37) so that Rutledge could shoot a "slip off of the side of the pit that was getting dangerous to the fellows working below." This was

his custom if there was a big enough rush to get it done so the workmen could get to work early.

Q. "He was anxious to have you shoot that off so the other boys could get to work; was that right? A. That is right" (R. 37).

Although his lower extremities were shattered and mangled by the explosion, Parfet crawled back to the powder magazine. When Mr. Rutledge came out of the pit about five minutes later, he found Mr. Parfet sitting on the ground trying to explode a cap with a file. After Mr. Rutledge took the file, cap, and powder away from Parfet and laid Parfet's head on his lap, Parfet stated, "I did a heck of a job of it," referring to his failure to bring the dynamite caps and fuse to him to shoot down the slip (R. 136).

The local doctor then came and questioned Parfet. Parfet told the Doctor that he was "in a jam". That was a favorite expression of his used on all occasions as shown by all of the evidence and had no significance, as these last words of the dying man were uttered when he was so shocked that he was crazy and so racked with pain and suffering that he could not stand it and asked the doctor to put him "out" of his pain. There were no eye witnesses to the explosion.

Mr. Parfet was a man experienced with powder, which he handled or was handled under his supervision daily. There was no reason why he should want to commit suicide. In fact, all of the evidence shows he had everything to live for and had just acquired the controlling interest in the clay properties. He had just purchased a new car for his son Bill who was graduating from the University of Michigan at Ann Arbor. He was living happily with his wife in their home at Golden, Colorado. He was normal and acting in his usual and customary way prior to the time of the explosion. The various powder men in his employ testified, and our offer was made to prove, that a man familiar with powder would not explode it at his feet if he intended

to commit suicide, but would place it in his hat, or under his arm or near some other vital spot as he was trying to do after he had been mangled and crippled by the accidental explosion at his feet. The evidence shows that Mr. Parfet was a heavy cigarette smoker and that the explosion could have been set off by a spark from a cigarette, the butt of a cigarette, or by the powder and caps falling on the rocky ground. The evidence shows that caps and powder are very uncertain and must be carefully handled and watched at all times as any percussion or friction might set the cap and powder off. As soon as the local doctor arrived and questioned Parfet he passed out, never re gained consciousness, and died at St. Anthony's Hospital about two hours later.

The plaintiff introduced the insurance policy and the double indemnity clause which required the defendant insurance company to pay the double indemnity of $6,000.00 in case of accidental death. The defendant had admitted in its answer that the death was caused by the explosion. The plaintiff thereupon rested. The defendant went forward and introduced evidence attempting to prove that when Rutledge found him after the explosion which crippled and mangled his feet and legs, Parfet was trying to set off the cap, and powder for the purpose of completing the job. Certain witnesses who had talked to Parfet or had seen him a few days before his death and one of the employees of the company who saw him shortly before the explosion testified that he acted in an unusual manner. Defendant also offered evidence that he was highly nervous the day before the explosion. Defendant offered a certified copy of the certificate of death, which was not in the form required by the statute, stating that the death was "suicide," but omitting the word "probably."

IV.

THE JURISDICTION OF THE SUPREME COURT TO REVIEW JUDGMENTS OF A CIRCUIT COURT OF APPEALS IS TO BE EXERCISED SPARINGLY AND ONLY IN CASES OF PECULIAR GRAVITY AND GENERAL IMPORTANCE.

This Court, in a great many cases, has determined that its jurisdiction to review judgments and decrees of the Circuit Courts of Appeal under Section 240 of the Judicial Code (28 U. S. C. A., Article 347) is to be exercised sparingly and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision and except in extraordinary cases, the writ will not be issued until final judgment.

> *Hamilton Brown Shoe Company v. Wolf Brothers and Company,* 240 U. S. 251; 36 Sup. Ct. 269; 60 L. Ed. 269.
>
> *American Construction Company v. Jacksonville T. & K. W. R. Co.,* 148 U. S. 372; 13 Sup. Ct. 758; 37 L. Ed. 486.
>
> *Forsyth v. Hammond,* 166 U. S. 506; 17 Sup. Ct. 665; 41 L. Ed. 1095.

Here the judgment of the Circuit Court of Appeals (R. p. 157) is that the judgment of the District Court be reversed and the cause remanded for further proceedings. The judgment is therefore not final.

> *Chicago & N. W. R. Co. v. Osborne,* 146 U. S. 354; 13 Sup. Ct. 281; 36 L. Ed. 1002;
>
> *Taylor v. Louisville N. R. Co.* (mem.), 172 U. S. 648; 43 L. Ed. 1182; 19 Sup. Ct. 887;
>
> *John Simmons Co. v. Greer Bros. Co.,* 258 U. S. 82; 42 Sup. Ct. 196; 66 L. Ed. 475.

Furthermore, in this case the questions involved are of importance only to the parties litigant. The mere fact that the parties are vitally interested in the outcome of this law suit does not make an extraordinary case in which

this Court should issue a writ of certiorari, especially in view of the fact that the judgment of the Circuit Court of Appeals is not a final judgment.

The decision of the Circuit Court of Appeals was based upon a construction of the Colorado law. Whether that decision is right or wrong is not of great importance to anyone excepting to these litigants. The inquiry here as to whether or not the Circuit Court of Appeals has correctly construed the Colorado law should be construed by this Court as not falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them.

In Re Woods, 143 U. S. 202; 12 Sup. Ct. 417; 36 L. Ed. 125.

V.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED TO REVIEW EVIDENCE OR THE PROPRIETY OF SUBMITTING ISSUES WHICH DEPEND UPON A CONSIDERATION OF EVIDENCE.

This Court lately held in the case of *General Talking Pictures Corp. v. Western Electric Company,* 304 U. S. 175-178; 58 Sup. Ct. 849; 82 L. Ed. 1273, that it would not grant a writ of certiorari to review evidence nor inferences to be drawn therefrom.

In *Houston Oil Co. v. Goodrich,* 245 U. S. 440; 38 Sup. Ct. 140; 82 L. Ed. 385, this Court held that where the propriety of submitting questions to the jury depends essentially upon an appreciation of the evidence, the writ of certiorari will not lie.

In *U. S. v. Johnston,* 268 U. S. 220-227; 45 Sup. Ct. 496; 69 L. Ed. 925, this Court said that "we do not grant a certiorari to review evidence or discuss specific facts."

Here the argument of the petitioner rests upon a consideration of the evidence and a discussion of that evidence in order to arrive at the conclusions it has reached. The

petitioner has throughout its brief, gone into the evidence in an endeavor to show that the evidence conclusively shows suicide.

VI.

CONFLICT OF DECISIONS OF CIRCUIT COURTS OF APPEAL ON QUESTIONS CONTROLLED BY STATE LAW IS NOT REASON FOR GRANTING CERTIORARI.

The petitioner, as one of its grounds for issuance of the writ of certiorari in this case, contends that the ruling of the Circuit Court of Appeals is in conflict with the decisions of this Court and other Circuit Courts of Appeal.

This Court has recently held in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202-206, 58 Sup. Ct. 860, 82 L. Ed. 1290, that:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. * * * "

A conflict, therefore, between the decision of the Circuit Court of Appeals in this case and decisions of the Supreme Court and decisions of other districts, involving questions of law controlled by the law of states other than Colorado, should not be a ground for the granting of this writ.

Under the case of *Erie R. Co. v. Tompkins,* 304 U. S. 54, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, this Court held that the Federal Courts are bound to follow the decisions of state courts in determining questions involving state law. Prior to that decision, the Federal Courts had followed their own decisions on such questions, but since that decision, this Court has repeatedly held that the Federal Courts are bound by the decisions of state courts.

The latest of such cases is *West v. American Telephone and Telegraph Company,* 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 196. Therefore, it is respectfully submitted that a conflict of decisions decided by the various Circuit Courts of Appeals cannot be the ground for the granting of certiorari unless such conflict involves the law of one particular state.

VII.

THE CIRCUIT COURT OF APPEALS DECISION THAT IF, UNDER THE EVIDENCE, DEATH BY VIOLENCE CAN BE EXPLAINED ON ANY REASONABLE HYPOTHESIS OTHER THAN SUICIDE, IT IS THE DUTY OF THE COURT OR JURY TO SO FIND, IS NOT CONTRARY TO THE COLORADO RULE.

Petitioner has gone to great lengths in endeavoring to reason that the language of the Circuit Court of Appeals is contrary to the decisions of the Courts of Colorado. The language of the Circuit Court of Appeals, complained of by petitioner, was adopted from the instruction contained in the case of *Prudential Insurance Company v. Cline,* 98 Colo. 275-277, 57 Pac. 2nd 1205. Under the ruling of *Erie v. Tompkins, supra,* a decision of the Supreme Court of Colorado is binding upon the Federal Courts.

(It was indeed a surprise to have counsel for petitioner in their brief filed in this Court, now urge that the Federal Courts are not bound by the Colorado decisions. In the District Court, a directly opposite position was taken by counsel for petitioner. In view of the decision of this Court in *Erie v. Tompkins, supra,* and other cases following that decision, we respectfully submit that no argument need be made that the Federal Courts are bound by the Colorado rule as adopted in its decisions.)

It was early decided by the Supreme Court of Colorado in *Germania Life Ins. Co. v. Ross Lewin,* 24 Colo. 43, 54, 51 Pac. 488, that the defense of suicide raised by an insurance company must be established by clear and satisfactory evidence. The Court there said:

"We are of the opinion that the evidence properly admitted, and that which was offered and erroneously refused, was sufficient to entitle the defendant to have the defense of suicide submitted to the jury; and although such plea, to prevail, must be established by clear and satisfactory evidence, it may, nevertheless, be so established by circumstantial evidence * * * ."

In a case involving an accident insurance policy, *Rex v. Continental Co.*, 96 Colo. 467-470, 44 P. (2nd) 911, held:

"When plaintiff established the death of insured to have been accidental, she made out a prima facie case under the terms of the policy and the burden then was up on the defendant, if it would avoid payment, to show that the accident was within one of the exceptions named in the policy."

In another case involving an accident insurance policy, *Preferred Accident Insurance Company v. Fielding*, 35 Colo. 19, 22, 23, 83 Pac. 1013:

" * * * When death by unexplained violent external means is established the law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased or by some third person; and hence, with the proof indicated, by reason of the presumption which attaches against self-destruction or the violation of the law, prima facie proof is also made of the fact that the injuries were accidental without direct or positive testimony on that point. * * *

" * * * Giving the testimony and the inferences which might be drawn the widest scope, the most that can be said is, that it is possible the injuries were not accidentally received; but it falls far short of establishing conclusively that they were intentionally inflicted by the deceased or some third person. On the contrary, under the rules which obtain

> in cases of this character it at least supports the presumption that the deceased was accidentally injured. In such circumstances it was therefore the province of the jury under the settled rules of evidence, from the testimony, the facts and circumstances, to determine whether or not the injuries were accidental, when the testimony elicited on that subject was consistent with the theory of an accident."

On page 22 and on page 23, in support of the foregoing the Colorado Supreme Court cited the case of *Travelers Insurance Company v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 Law. Ed. 308.

The Colorado Court of Appeals in *Lampkin v. Travelers Insurance Co.*, 11 Colo. App. 249-256, 52 Pac. 1040, had under consideration an accident policy. There the Court of Appeals said:

> "The rule in this case is that the burden is on the defendant in an action of this kind to prove that the death was from one of the excepted causes, at least after plaintiff has made a prima facie showing of accidental death."

In *Bickes v. Travelers Insurance Co.*, 87 Colo. 297-299, 287 Pac. 859, the Supreme Court of Colorado said:

> "The evidence was sufficient to require a denial of the motion for nonsuit. It justified a finding that Bickes came to his death by unexplained violent external means, and this is prima facie proof that the injuries were accidental; direct or positive testimony on that point is not required. When death by unexplained violent external means is established, the law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased or by some third person. *Preferred Accident Insurance Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Ann. Cas. 916; *Lampkin v. Travelers'*

Insurance Co., 11 Colo. App. 249, 52 Pac. 1040; *Travelers' Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308."

In *Occidental Life Insurance Company v. United States National Bank*, 98 Colo. 126-131; 53 P. (2d) 1180, the Supreme Court of Colorado said:

> "When the death by unexpected violent external means is established, the law does not presume suicide or murder; the presumption is to the contrary. Such a showing is prima facie proof that the death was accidental. *Preferred Accident Ins. Co. v. Fielding, Admr.*, 35 Colo. 19, 83 Pac. 1013; *Bickes v. Travelers Insurance Co.*, 87 Colo. 297, 287 Pac. 859; *Lampkin v. Travelers Insurance Co.*, 97 Colo. 297, 287 Pac. 859; *Lampkin v. Travelers Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040. But that prima facie showing may be overcome by evidence, either direct or circumstantial. In the present case there was more than the bare fact of death by unexplained violent external means; there were circumstances sufficient to require a finding whether the death was accidental or suicidal. In such a situation the widest latitude of inquiry as to the existence of a motive to commit suicide should be permitted to enable the insurer to overcome, ifg it can, the presumption against suicide. * * *"

The cases cited by the Supreme Court in the above case are all acident policy cases. If the Supreme Court of Colorado intended a different rule to apply in cases where a straight life policy is involved from cases where an accident policy is involved, in that case, it had an opportunity to so determine. It must have determined that when death by violent external means is established, a prima facie showing that the death was accidental is made. It therein approved the case of *Occidental Life Ins. Co. v. Graham* (8 C. C. A.), 22 F. (2d) 528. The Graham case involved an accident policy written in Colorado upon the life of a Colorado citizen.

Colorado has consistently held that the general and natural presumption is against suicide.

Hershey v. Agnew, 83 Colo. 89, 262 Pac.;
Prudential Company v. Cline, supra.

Here the evidence established death due to external violent means. This was not denied by the petitioner and no evidence was introduced to show that the petitioner's death was due to any other cause than external and violent means. Having shown that death was due to external violent means, the general and natural presumption against suicide made out a prima facie case in favor of the respondent. The burden then shifted to the petitioner to prove by direct or circumstantial evidence that the death was not accidental but was due to suicide. The District Court gave an instruction "and it is further admitted by both sides that he died as the result of this explosion of dynamite, and the defendant, the insurance company, setting up suicide, has the burden of proving to your satisfaction by a preponderance of the evidence that his death was suicide. Unless you so find, your verdict must be for the plaintiff. Suicide, as I have stated, gentlemen, must be proven, and if you can reconcile the facts in this case upon any reasonable hypothesis based upon the evidence that the death of the insured was not caused by suicide, it is your duty to do so, and find for the plaintiff. And where a man suffers injuries resulting in his death, which injuries might have been caused by accident or might have been intentionally inflicted upon himself, and there is no preponderance of evidence as to the cause of such injuries, then the presumption is that death was caused by accidental means and not intentionally self-inflicted or suicidal." * * * "Now, that, gentlemen, is some of the law which will govern you in deciding this case. The defendant insurance company must prove to your satisfaction that this death resulted from suicide; that is, under these circumstances that he caused this dynamite to explode, which resulted in his death. Otherwise your verdict must be for the plaintiff."

The decision of the Circuit Court of Appeals is not contrary to the holding of any Colorado decision. The statements of counsel for petitioner that a different rule applies in a case involving an accident policy, or double indemnity clause is contrary to the holding of the Supreme Court in the cases above cited.

VIII.

THE COURT'S RULING THAT THE TRIAL JUDGE'S COMMUNICATION TO THE JURY BY MEANS OF A DEPUTY MARSHAL AND NOT A BALIFF OUTSIDE OF THE PRESENCE OF COUNSEL CONSTITUTES REVERSIBLE ERROR IS NOT CONTRARY TO THE DECISION OF ANY OTHER FEDERAL COURT.

Counsel for petitioner contend that the ruling of the Circuit Court of Appeals is contrary to the ruling of other Circuit Courts of Appeal. However, the only decision of Circuit Courts of Appeals which is similar in facts to this case is that of *Stone v. U. S.* (6 C. C. A.), 113 F. (2d) 79-77. That case involved a communication by an unauthorized person with the jury.

Here, the jury sent to the Judge a communication by a deputy marshal. The bailiffs were sworn, "You are to suffer no person to speak to them, nor speak to them yourselves, unless to ask them whether they are agreed and that you will not suffer them to separate until they are agreed." Notwithstanding that oath, the bailiffs permitted the deputy marshal to carry a written question from the jury to the trial judge. The trial judge admits that he instructed the deputy marshal to answer verbally, "no."

In all of the cases cited by counsel, the communication was between the Court or some Court official and the jury and in most of the instances was in writing. Here, it was by luck that one of the counsel for respondent discovered the unauthrized communication between the jury and the Court.

In criticizing such conduct on the part of the trial

Court, Circuit Court Judge Hamilton in *Stone v. U. S.*, supra, said:

> "Faith in the courts and in the jury system must be maintained and it is proper that on questions such as we have here the rule should be such as to support the faith of all litigants in our judicial system and, as a part thereof, trial by jury. That faith can be sustained only by keeping our judicial proceedings free from the suspicion of wrong. The question is, not whether any actual wrong resulted from the conversation of Calloway with the juror under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice. * * *
>
> "There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation. The courts have exercised some discretionary power in dealing with the conduct of juries while not in improper communication with other persons and have not always disturbed verdicts for misconduct which were the result of the uninfluenced action of jurors alone (*Klose v. United States*, 8 Cir., 49 F. (2d) 177), but when jurors have communications with strangers, the case is different and cannot be dealt with so easily. * * *

Litigants before the Federal Court are entitled to believe that the oath of the bailiffs will be complied with, not only by the bailiffs themselves, but also by the Court. It should not be necessary for litigants, after Court is adjourned in the evening, to remain in the court room to see that a Federal District Judge does not have unauthorized communication with a jury which is then deliberating upon the case. If the action of the trial court in this case be sustined, there is no alternative left for parties litigant except to remain in attendance at all times.

Parties litigant are required to advance the expenses of the jury and of the bailiffs during the time the jury is deliberating. Those expenses include not only meals but also rooms. Here the respondent contributed her share. The result was that after relying upon the supposition that the bailiffs would suffer no one to speak to the jury nor speak to the jury themselves, an unauthorized conversation was had by the chief deputy marshal with the jury. It is difficult to explain to clients how such irregularities can be permitted.

The trial court in this case has been reversed on previous occasions because of extra judicial communications with the jury.

Fina v. U. S., 46 Fed. (2d) 643;
Little v. U. S., 73 F. (2d) 861.

The provisions of Rule 61 of the Rules of Civil Procedure and of Section 391, Title 28, U. S. C. A., should not be extended to include the practice of Federal Courts such as is here involved. The Federal Courts themselves should be zealous in maintaining the dignity of those courts. Actions on behalf of a Federal Trial Court, such as here involved, cannot be conducive to maintaining the confidence which the people are entitled to have in their Federal Courts.

The Tenth Circuit Court of Appeals was not only correct in its rulings on this point but the ruling of that court tends to maintain the dignity which belongs to a Federal Court. It will go far in maintaining confidence in the Federal Courts.

When the facts are all considered, the only Federal Case which is similar to the case under consideration is that of *Stone v. U. S., supra,* the holding of which is similar to the holding of the Tenth Circuit Court of Appeals here.

CONCLUSION.

No question of gravity or importance is here involved. Where the facts are similar, there is no conflict of decision among various Circuit Courts of Appeal. The decisions of the Tenth Circuit Court of Appeals is in accord with the decisions of the Colorado Supreme Court in similar cases.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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